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Supreme Court of the United States

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT; CHEROKEE COUNTY SOIL & WATER CONSERVATION DISTRICT; GERALD PHILLIPS; ALLEN DEHART; LLOYD MILLSAPS; BILL TIPTON; C.B. NEWTON; EDDIE WOOD; GRAHAM COUNTY,

Petitioners,

v.

UNITED STATES OF AMERICA EX REL KAREN T. WILSON

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE NATIONAL DEFENSE INDUSTRIAL ASSOCIATION, AEROSPACE INDUSTRIES ASSOCIATION, AND PROFESSIONAL SERVICES COUNCIL AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

Amici Curiae **National Defense Industrial Association, Aerospace Industries Association, and Professional Services Council** have a substantial interest in the subject of this appeal — the statute of limitations governing retaliatory discharge claims filed by government contractor employees (or other individuals) who bring *qui tam* actions under the federal False Claims Act ("FCA"), 31 U.S.C § 3729 *et seq.* The government contractor members of these associations are the types of companies likely to be subjected to claims alleging such "whistleblower" retaliation. The associations are submitting this *amicus curiae* brief in order to shed additional light on the reasons why the lower court's attempt to engraft the six-year limitations period for "false claims" causes of action onto retaliatory discharge claims is wholly unfair and impractical, as well as plainly inconsistent with the language, structure, and purpose of the FCA.

The **National Defense Industrial Association** (NDIA) is a non-partisan, non-profit organization with a membership encompassing over 1,100 companies and close to 40,000 individuals. NDIA's members, which include some of the nation's largest defense contractors as well as many small businesses, provide a wide variety of goods and services to the Federal Government. The association has a specific interest in policies and practices concerning the government's acquisition of goods and services, including

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[1] The parties' letters of consent to the filing of this brief have been lodged with the Clerk. Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

research and development, procurement, and logistics support.

The **Aerospace Industries Association** (AIA) represents the nation's leading manufacturers and suppliers of civil, military, and business aircraft, helicopters, unmanned aerial vehicles, space systems, aircraft engines, missiles, materiel, and related components, equipment, services, and information technology.

The **Professional Services Council** (PSC) is the leading national trade association that represents companies of all sizes providing professional and technical services to the virtually every agency of the federal government, including information technology, engineering, logistics, operations and maintenance, consulting, international development, scientific, environmental and social sciences.

As the government contracting industry's leading voices on federal procurement matters, these associations sponsor numerous seminars emphasizing compliance with federal procurement laws and regulations, including the FCA, to enhance their member companies' ability to comply with their responsibilities as government contractors. NDIA and AIA have submitted *amicus* briefs to the Supreme Court in matters involving government contracting, including two FCA cases heard by the Court in recent years.[2]

Amici believe that the opinion below, which provides plaintiffs with an excessively long period of time in which to

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2 AIA and NDIA's predecessor submitted briefs in *Hughes Aircraft Co. v. United States ex rel. Schumer*, 519 U.S. 926 (1996) (successful challenge to the retroactive application of the 1986 FCA amendments), and AIA submitted a brief in *United States ex rel. Stevens v. Vermont Agency of Natural Resources*, 529 U.S. 765 (2000) (unsuccessful constitutional challenge to *qui tam* relator's standing).

file retaliation claims, does not enhance FCA enforcement. Nor does the ruling provide clarity to litigants or other interested parties as to when the period of limitations commences.

Rather, the lower court's ruling permits some employees to delay seeking redress of their alleged retaliation claims until the matter has grown stale and the collective memory of other personnel involved in the matter has faded. Further, holding that the limitations period commences when the alleged false claim is submitted instead of when the alleged retaliation occurred would produce impractical and counter-productive results, including in some instances barring the retaliation claim before the alleged retaliation has occurred, and in other instances rendering it impossible for either party to identify when the period commenced.

SUMMARY OF ARGUMENT

The Fourth Circuit determined that an employee who claims that she has been retaliated against by her employer for reporting violations of the FCA has six years from the employer's submission of the false claim to file her retaliatory discharge action under § 3730(h). *Amici* agree with petitioners that the FCA's six-year statute of limitations applies only to the cause of action alleging that a false claim was submitted by a contractor, and *not* to the employee's cause of action for retaliatory discharge.

Because, in *amici*'s view, the FCA does not provide a limitations period for retaliatory discharge claims, such actions are governed by the most closely analogous state law limitations period, typically for wrongful discharge in violation of public policy. Contrary to the lower court's finding that there is inherent uncertainty in identifying the appropriate state statute of limitations (Pet. App. 25a-26a), the table included in this *amicus* brief (*infra* at 17-18) shows the appropriate statute of limitations for each of the 45 states that recognize a cause of action for wrongful discharge in violation of public policy. The table reflects that most states,

including states such as California and Virginia where there is a heavy concentration of government contractors, provide a limitations period of two years or less, thereby lending credence to the dissent's succinct observation that "six-years is a long time." Pet. App. 29a.

Amici maintain that the Fourth Circuit's majority decision runs afoul of the language, structure and purpose of the FCA. The associations also take issue with the lower court majority's unsupported generalizations about the nature of FCA litigation, including the court's conclusion that commencing the period of limitations from the date of the false claim is justified because it supposedly is easier to pinpoint than the date of the alleged retaliatory conduct. To the contrary, *qui tam* complaints frequently are vague as to when the alleged false claim was submitted, making it difficult, if not impossible, to determine when the limitations period for a retaliation claim would commence. On the other hand, the date of the alleged act of retaliation is more easily identifiable because the employee certainly would know when he or she was terminated or suffered other alleged harm, and the employer could refer to personnel records which would reflect when any disciplinary action occurred.

There is no statutory or policy justification for commencing the limitations period for retaliation claims from any date other than the date of the retaliatory act. As described in the specific examples below (*infra* at 10-12), the Fourth Circuit's construction would produce impractical and unmanageable results and needless further litigation.

ARGUMENT

I. THE FALSE CLAIMS ACT'S STATUTE OF LIMITATIONS PLAINLY APPLIES ONLY TO "FALSE CLAIMS" CAUSES OF ACTION

Contrary to the Fourth Circuit's decision, the "plain language" of the FCA's statute of limitations, § 3731(b), does not afford a six-year limitations period in which to

bring a retaliation action under § 3730(h). Rather, § 3731(b), when read in full and in context, applies exclusively to "false claims" causes of action.

The court of appeals attempted to justify its finding by relying solely upon § 3731(b)'s introductory reference to an action "under section 3730," and concluded that those words – by themselves – mean that the statute of limitations covers an action under *any* part of § 3730, including subpart (h), the retaliatory conduct provision.[3] Pet. App. 5a ("an action under section 3730 which necessarily includes an action for retaliation under section 3730(h)"). Once the court concluded that the introductory reference was inclusive of all actions under § 3730, including subpart (h), it then attempted to force-fit the additional verbiage of the provision – which clearly has nothing to do with the employer's retaliatory conduct – into a statute of limitations governing the filing of retaliatory conduct claims.

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3 The FCA's statute of limitations (§ 3731(b)) states in full: "A civil action under section 3730 may not be brought --

(1) more than 6 years after the date on which the violation of 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last."

The retaliatory conduct cause of action, § 3730(h), provides: "Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole."

The FCA's statute of limitations, read as a whole, does not give any indication that it applies to retaliatory discharge claims under § 3730(h). Rather, the provision falls under the heading "False claims procedure," a title which itself suggests that the provision is limited to the "false claims" causes of action arising under § 3729, which are brought either by the government under § 3730(a) or a private person (a so-called *qui tam* relator) under § 3730(b).

After § 3731(b)'s introductory reference to "[a] civil action under section 3730," every other reference point in the statute of limitations is to accrual of the cause of action for submitting a false claim. Section 3731(b)(1) refers specifically to the date of the violation of § 3729, and § 3731(b)(2) refers to the date when the government first learned of the violation of § 3729.[4] *See supra,* n.3.

The Fourth Circuit failed to heed a primary rule of statutory construction which it cited, namely that in determining whether the language is plain, courts must look to "'the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" Pet. App. 4a (*citing Robinson v. Shell Oil Co.*, 519

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4 Section 3731(b)(2) tolls the running of the statute for up to three years when the "facts material to the right of action" were known "by the official of the United States charged with responsibility to act in the circumstances . . . ." No government official is responsible for or involved in bringing an action to enforce an employee's claim under § 3730(h). Clearly the "right of action" that is referenced is the false claims cause of action. Accordingly, the tolling provision, which can extend the statute of limitations to ten years, pertains only to a cause of action under § 3729 for submission of a false claim for payment to the government. The Fourth Circuit does not suggest that this tolling provision has any applicability to a retaliation claim. If the Court reads the provision's subsections consistently, just as the "right of action" mentioned in § 3731(b)(2) has no bearing on a retaliation claim, neither does the "violation" mentioned in § 3731(b)(1).

U.S. 337 (1997)). In contrast, the Ninth Circuit, in *United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027, 1034 (9th Cir. 1998), and Judge Wilkinson in his dissent in the instant case (Pet. App. at 30a-32a), correctly applied this rule of statutory construction and found that the provision plainly applies only to the underlying false claim cause of action, not to retaliatory conduct claims. No reference to legislative history or extraneous analysis is necessary.

Beyond erroneously interpreting the plain meaning of the statute, the Fourth Circuit also misconstrued the FCA's legislative history. When Congress added § 3730(h) in 1986, it amended the FCA's statute of limitations to refer specifically to false claims allegations under § 3729. False Claims Amendment Act of 1986, Pub.L. 99-562, 100 Stat. 3153. *Lujan* correctly reasoned that Congress intended this change to narrow the FCA's statute of limitations to violations of § 3729.

> If Congress had wanted to retain a six-year statute for all actions under section 3730, including retaliation claims, it would have left the pre-1986 language of section 3731(b) intact when it enacted the 1986 amendments to the FCA. Instead, Congress, while adding a provision for retaliation claims under 3730(h), narrowed the application of the six-year statute of limitations to violations of section 3729. Section 3729 specifically and strictly addresses false claims, not retaliation claims.

162 F.3d at 1034-35. *Lujan* further observed that Congress' stated rationale for the lengthy period of limitations – to ensure the government's rights are not lost through the violator's deception – "is inapposite to a private claim for retaliation," observing, "[t]here is nothing covert or deceptive about retaliation – the victim feels its sting immediately." *Lujan*, 162 F.3d at 1035 (*citing* S.Rep. No. 99-

345, 99th Cong., 2d Sess. 15 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5280).

The Fourth Circuit's reference to legislative history is unavailing, and the Ninth Circuit's view that Congress actually narrowed the statute of limitations to exclude all but false claims causes of action is the more sound conclusion.

II. IT WOULD BE UNFAIR AND IMPRACTICAL TO APPLY THE FALSE CLAIMS ACT'S STATUTE OF LIMITATIONS TO RETALIATORY DISCHARGE CLAIMS

The Fourth Circuit's erroneous application of the FCA's statute of limitations to retaliation claims creates a situation unlike any other wrongful discharge statute of limitations. As noted in the dissent, the court "introduces an unprecedented oddity into state and federal law by disconnecting the statute of limitations for anti-retaliation claims from the actual retaliatory acts themselves." Pet. App. 28a-29a. The majority's reasoning and its generalizations about the nature of FCA litigation are unrealistic and would lead to absurd outcomes, some of which are illustrated herein.

Instead of linking the limitations period for the retaliation claim to the alleged act of retaliation, the decision is premised on an *erroneous* finding that the act of retaliation is somehow linked to the act of submitting the false claim. "[Section] 3730(h) subsumes a violation of section 3729, even if it does not do so explicitly. . . . Because an action under section 3730 will not lie absent an alleged violation of section 3729, it is clear that Congress has elected to identify a single, readily identifiable point at which to begin the limitations periods for all actions under section 3730." Pet. App. 14a.

This notion that a retaliation claim will not lie absent an underlying allegation that the employer submitted a false claim, is unfounded. Courts have held that § 3730(h) is

broadly worded to protect employees who investigate possible false claims, even if their investigation comes up empty or they decide not to bring a false claims cause of action. Thus, liability under § 3730(h) can exist even where there has been no alleged violation of § 3729 (*i.e.*, no false claim allegation by the employee). *See, e.g., United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 236 (1st Cir. 2004) ("retaliation claim does not require the plaintiff to have filed an FCA lawsuit or to have developed a winning claim at the time of the alleged retaliation"); *Hutchins v. Wilentz, Goldman & Spitzer*, 253 F.3d 176, 188 (3rd Cir. 2001) ("employees need not actually file a False Claims Act suit to assert a cause of action under section 3730"); *Childree v. UAP/GA AG Chem., Inc.*, 92 F.3d 1140, 1143 (11th Cir. 1996) (plaintiff "never considered" bringing false claims cause of action but was nevertheless permitted to maintain her retaliation claim); *Neal v. Honeywell Inc.*, 33 F.3d 860, 861 (7th Cir. 1994) (plaintiff claimed retaliation by employer after she supplied information about false claims to in-house counsel, but she did not file § 3729 claim against her employer); *Clemes v. Del Norte County Unified School District*, 843 F. Supp. 583, 585 (N.D. Cal. 1994) (plaintiff filed discrimination claims under several statutes including § 3730(h), but did not file a false claims action). Indeed, one court has held that a plaintiff may maintain a § 3730(h) retaliation claim even if a § 3729 complaint has been rejected as meritless by a jury. *See United States ex rel. Yesudian v. Howard Univ.*, 153 F.3d 731 (D.C. Cir. 1998).

As in the foregoing cases, if there is no underlying allegation that a false claim was submitted, then under the Fourth Circuit's construction, the period of limitations for the retaliation claim would *never* commence. That is an absurd result. It is well-settled that this Court will not construe a statute in a manner that leads to absurd or futile results. *See United States v. American Trucking Assns., Inc.*, 310 U.S. 534, 543 (1940); *In re Chapman*, 166 U.S. 661, 667 (1897) ("nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the

legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion").

Even when a retaliation claim is accompanied by an underlying false claims allegation, because the former, by its very nature, would occur subsequent to the latter, the two acts do not, and cannot, occur simultaneously. Indeed, they typically are far removed in time from each other. This is demonstrated in the following common scenarios, which show the impracticality of setting the accrual date for the retaliation claim as the same date that the false claim is submitted.

Example 1. In 2000, during the early stages of performing a long-term government contract, the employer submits a false claim. The employee does not discover the false claim until 2005 when the contract performance is completed and the employee examines all of the cost submissions. Immediately upon discovery in 2005, the employee reports the matter to the employer and to the government. If the employer postpones retaliation against the employee until 2007, under the Fourth Circuit's illogical construction, the employee's retaliation claim would be time barred.

Example 2. In the same scenario as Example 1, the employee files a *qui tam* action in 2005 upon discovering the false claims, but the matter remains under seal for two years, during which time the employer is unaware of the suit. In 2007, when the seal is lifted and the employer learns of the whistleblowing, the employer immediately retaliates against the employee. Regardless of whether the employee files a separate action under § 3730(h) or amends his *qui tam* complaint to add the new retaliation claim, the claim would be time barred.

This example is not far-fetched given the procedural aspects of initiating a *qui tam* action. Under § 3730(b)(2), *qui tam* complaints are filed under seal for at least 60 days while the government investigates the matter and decides

whether or not to intervene. The primary intent of this provision is to permit the government to investigate the matter without tipping off the defendant. *Lujan*, 67 F.3d at 243. It is not unusual for *qui tam* complaints to remain under seal for years while the government conducts its investigation.[5] Thus, the time period between the submission of the false claim and the notification to the employer about the employee's whistleblowing (which is one of the predicates for a retaliation claim)[6] can be lengthy. Under the Fourth Circuit's illogical construction, the retaliation claim would be time barred in such situations.

Example 3. Employee A works in the accounts receivable department and witnesses the submission of the false claim on the day it was submitted in 2000. He complains about the conduct and suffers retaliation on that day. Employee B works in the internal audit department discovers the same false claim during her contract close-out audit in 2005. Employee B complains immediately to the employer who immediately retaliates against her. Though both employees suffered retaliation immediately after they

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5 *See e.g., United States ex rel. Clausen v. Laboratory Corp. of America*, 290 F.3d 1301, 1303-04 (11th Cir. 2002) (complaint under seal for almost four years); *United States ex rel. Madden v. General Dynamics Corp.*, 4 F.3d 827, 829 (9th Cir. 1993) (complaint under seal for over two years); *United States ex rel. Yannacopolous v. General Dynamics*, 315 F. Supp.2d 939, 944 n.7 (N.D. Ill. 2004) (complaint under seal for seven years); *United States ex rel. Ortega v. Columbia Healthcare*, 240 F. Supp. 2d 8, 11 (D.D.C. 2003) (complaint remained under seal for three years); *United States v. St. Joseph's Reg'l Health Ctr.*, 240 F. Supp. 2d 882, 883-84 (W.D. Ark. 2002) (complaint remained under seal as to some defendants for over five years).

6 *See Hutchins v. Wilentz, Goldman & Spitzer*, 253 F.3d 176, 186 (3rd Cir. 2001) (retaliation under § 3730(h) requires proof that employer had knowledge of plaintiff's whistleblowing at the time of the retaliatory conduct).

complained about the same false claim, employee A has six years to file his retaliation claim and employee B has one year.

Example 4. Employee A witnesses the submission of a false claim in 2000. In the same week, employee A complains to the employer, suffers retaliation and files a *qui tam* action and a retaliation claim. The complaint is unsealed in 2004 after a lengthy government investigation. Three years later in 2007, the case proceeds to trial. Employee B is called as a witness and testifies against the employer. Later that day, the employer fires employee B. Employee B's claim under § 3730(h) already would be time barred under the Fourth Circuit's illogical construction.

These scenarios illustrate that if the accrual date of a retaliation claim is held to be the date the false claim is submitted rather than the date the retaliation occurs, then individual employees would have widely varying periods of limitation governing their retaliation claim depending on how close in time the retaliation was to the submission of the false claim.

This impractical result was observed in one of the earliest decisions involving the FCA's retaliatory discharge provision.

> [I]f the accrual date is not a function of the date of retaliation, individual employees will have widely varying periods of limitations. It is both unreasonable and unfair for identically situated plaintiffs to be held to widely varying periods of limitation because the accrual date for the limitations period is unrelated to their claim. . . . . [The purpose behind § 3730(h)] is best satisfied by allowing an equal period for all employees to bring a private action and to have that period to begin to run from the time of the retaliation.

United States ex rel. Truong v. Northrop Corp., No. CV 88-967 MRP, 1991 WL 496831, at *2 (C.D. Cal. Nov. 26, 1991). Application of state statutes of limitations would allow an equal period for all employees affected by the same alleged act of retaliation who bring suit in the state where the conduct occurred, which is normally where such actions are filed.

The above scenarios demonstrate the fundamental flaw in the Fourth Circuit's assumption that there is a close temporal relationship between the submission of the false claim and the retaliatory discharge act.

III. ENGRAFTING THE FALSE CLAIMS ACT'S STATUTE OF LIMITATIONS ONTO RETALIATORY DISCHARGE CLAIMS WOULD ENGENDER CONFUSION RATHER THAN FOSTER SIMPLICITY

The Fourth Circuit errs in concluding that its construction fosters "simplicity of administration" on the theory that (a) it is easier to pinpoint the date on which the false claim occurred than the date on which the retaliation occurred, and (b) it is preferable to utilize a single federal statute of limitations rather than subject retaliation claims to "vagaries of a patch-work of state limitations periods, some as short as six months." Pet. App. 13a-25a. The dissent correctly notes that there is no indication in the legislative history of Congress' desire to simplify the statute of limitations by having the false claim cause of action and retaliation claims accrue from the same starting point. Pet. App. 37a-41a.

A. It Typically Is Easier For Both Employee And Employer To Ascertain The Date Of The Alleged Retaliatory Act Than The Date Of The Alleged False Claim

The court asserts "it is easier to determine the date of a false claim than to pin down the time of retaliatory acts; the

claim is a document, but arguments about retaliation depend on oral exchanges and are subject to failure of memory as well as the risk of prevarication." Pet. App. 14a (*citing Neal v. Honeywell, Inc.*, 33 F.3d at 865).

This notion is far removed from the reality faced by FCA defendants in the many cases in which the date of the alleged false claim is anything but clear. *Qui tam* complaints typically are subjected to challenge under Rule 9(b) of the Federal Rules of Civil Procedure for lack of particularity as to when the false claim was submitted. While some complaints are dismissed on this basis, others survive without clearly setting forth the date of the false claim, making it difficult to ascertain the commencement of the limitations period. *See, e.g., United States ex rel. Williams v. Martin-Baker Aircraft Co., Ltd., 389 F.3d 1251 (D.C. Cir. 2004)* (upholding dismissal of relator's FCA claim for its failure to specify dates within an open-ended period spanning several years while, at the same time, reinstating the associated retaliation claim); *Bantsolas ex rel. United States v. Superior Air and Ground Ambulance Transp, Inc.*, No. 01 C 6168, 2004 U.S. Dist. LEXIS 4540, at *6, 10 (N.D. Ill. March 18, 2004) (relator directed to amend complaint where false claims allegations encompassed 21 month period but failed to identify dates of false claims within the period); *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of America, Inc.*, 238 F. Supp. 2d 258, 268 (D.D.C. 2002) (relator adequately pled scheme spanning twelve years despite failure to identify specific dates of alleged false claims); *Karvelas*, 360 F.3d at 223, 232-35 (dismissal of FCA allegations upheld where relator failed to specify dates of false claims allegedly committed from 1994 to 1997). In these and other similar factual situations, it is difficult to assert a statute of limitations defense without undertaking prolonged discovery efforts. In that regard, the judicial economy that normally results from applying statutes of limitations is severely diminished.

Under the Fourth Circuit's construction, it is conceivable that a plaintiff could argue that an act of

retaliation which occurred seven years earlier is not time barred because the wrongdoing that allegedly resulted in the submission of false claims continues up to the present time. Thus, the mere allegation of continuing conduct would breathe life into a stale retaliation claim that the employer never expected to see.

In contrast to the uncertainty which typically surrounds the time that the alleged false claim was submitted, the date of an alleged retaliatory act by the employer is more easily ascertainable. Whereas the employee may be unaware of the when the false claim was submitted to the government, he certainly would know the precise date on which some supposed act of retaliation directed against him occurred. Similarly, while the timing of some retaliatory acts, such as threats or harassment, might be difficult for the employer to ascertain, there almost certainly would be a record of acts such as termination of employment, demotion, suspension or other official disciplinary action. These dates could be discovered by examining the employee's personnel file; thus, both an employee and employer would be in a position to know when the period of limitations commenced.

B. Applying State Statutes Of Limitation To Federal Causes Of Action Is Neither Unusual Nor Unduly Complicated

It is not unusual for federal statutes to omit an all-encompassing statute of limitations. *See Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 147 (1987) ("Given our longstanding practice of borrowing state law, and the congressional awareness of this practice, we can generally assume that Congress intends by its silence that we borrow state law."). In such instances, the rule of statutory construction calls for applying the most closely analogous statute of limitations under state law. *See Reed v. United Transport Union*, 488 U.S. 319, 322 (1989) (applying North Carolina's three year statute of limitations for personal injury claims to a claim involving violation of the right to free

speech under the Labor – Management Reporting and Disclosure Act of 1959 (29 U.S.C. § 411(a)(2)), a law which contained no express statute of limitations for such claims).

This Court has acknowledged that sometimes the practice of relying on state statutes of limitations can result in confusion and inconsistency where it is difficult to determine the most analogous state law from a variety of similarly worded statutes containing different limitations periods. *See Owen v. Okure*, 488 U.S. 235, 240 (1989). That is not the case here. While the decision below imagines difficulties in determining the appropriate state law limitations period, most states have a statute of limitations for personal injury claims which normally would apply to the tort of wrongful discharge in violation of public policy. For example, *Lujan* held that this tort was most analogous to the § 3730(h) claim, and therefore, it applied California's one-year statute of limitations (in effect at the time) for wrongful termination in violation of public policy (Cal.Civ.Proc.Code § 340(3) (West Supp. 1998)). *Lujan*, 162 F.3d at 1035.

Each of the following state statutes of limitations have been held to be applicable to claims for wrongful discharge in violation of public policy, likely the "most closely analogous" state statute to apply in a § 3730(h) action brought in the federal court in that state.[7]

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[7] As the decision below notes, some states have limitations periods for particular actions, such as the Texas law imposing a 180-day period in which a health care worker has to file an action alleging retaliation for reporting illegal or unethical conduct in the operation of a health care facility. Pet. App. 24a-25a (*citing* Tex. Health & Safety Code Ann. § 161.132, 161.134). Where the § 3730(h) allegations appear to be analogous with a particular state statute, the court would have to decide between that statute and the general provision governing the filing of wrongful discharge actions. In most instances, as in *Lujan* and in the case

(Footnote cont'd on next page)

State	***Limitations Period***	***State Statute***
AL	2 years	Ala. Code § 6-2-38
AZ	1 year	Ariz. Rev. Stat. Ann. § 12-541
AR	5 years	Ark. Code Ann. § 16-56-115
CA	2 years	Cal. Civ. Proc. Code § 335.1
CO	2 years	Colo. Rev. Stat. Ann. § 13-80-102
CT	3 years	Conn. Gen. Stat. Ann. § 52-577
DE	2 years	Del. Code Ann. tit. 10, § 8119
DC	3 years	D.C. Code Ann. § 12-301
HI	2 years	Haw. Rev. Stat. Ann. §§ 657-1, 657-4, 662-4
ID	4 years	Idaho Code §§ 5-217, 5-219, 5-224
IL	2 years	735 Ill. Comp. Stat. Ann. 5/13-202
IN	2 years	Ind. Code Ann. § 34-11-2-4
IA	2 years	Iowa Code Ann. § 614.1
KY	5 years	Ky. Rev. Stat. Ann. § 413.120
LA	1 year	La. Civ. Code Ann. art. 3492
MD	3 years	Md. Code Ann., Cts. & Jud. Proc. § 5-101
MA	3 years	Mass. Gen. Laws Ann. ch. 260, § 2A
MN	2 years	Minn. Stat. Ann. § 541.07
MS	3 years	Miss. Code Ann. § 15-1-49
MO	5 years	Mo. Ann. Stat. § 516.120
MT	1 year	Mont. Code Ann. §§ 39-2-901 *et seq.*
NE	4 years	Neb. Rev. Stat. Ann. § 25-212
NV	3 years	Nev. Rev. Stat. Ann. § 11.190
NH	3 years	N.H. Rev. Stat. Ann. § 508:4
NJ	6 years	N.J. Stat. Ann. § 2A:14-1
NM	4 years	N.M. Stat. Ann. § 37-1-4
NY	1 year	N.Y. C.P.L.R. 215

(Footnote cont'd from previous page.)

below, the general wrongful discharge statute of limitations would apply.

State	*Limitations Period*	*State Statute*
NC	3 years	N.C. Gen. Stat. § 1-52
ND	6 years	N.D. Cent. Code § 28-01-16
OH	4 years	Ohio Rev. Code Ann. § 2305.09
OK	2 years	Okla. Stat. Ann. tit. 12, § 95
OR	2 years	Or. Rev. Stat. § 12.110
PA	2 years	Pa. Stat. Ann. tit. 42 § 5524
RI	N/A	R.I. Gen. Laws § 9-1-14
SC	3 years	S.C. Code Ann. § 15-3-530
SD	3 years	S.D. Codified Laws § 15-2-14
TN	1 year	Tenn. Code Ann. § 28-3-104
TX	2 years	Tex. Civ. Prac. & Rem. Code Ann. § 16.003
UT	1 year	Utah Code Ann. § 78-12-29
VT	3 years	Vt. Stat. Ann. tit. 12, §§ 511, 512
VA	2 years	Va. Code Ann. § 8.01-243
WA	3 years	Wash. Rev. Code Ann. § 4.16.080
WV	2 years	W. Va. Code § 55-2-12
WI	2 years	Wis. Stat. Ann. § 893.57
WY	4 years	Wyo. Stat. Ann. § 1-3-105

Another reason offered by the Fourth Circuit for avoiding state statutes of limitations is that generally the state statutes provide shorter limitations periods. That observation is correct. Nearly half the states listed above provide a limitations period of two years or less, and nearly three quarters provide a period of three years or less. (These states include California, Texas, Virginia, Pennsylvania, New York, Colorado, and Maryland, states with heavy concentrations of government contractor employees.) These shorter periods, however, do not support the court's efforts to manufacture a relationship between the cause of action for retaliation and the unrelated FCA's longer limitations period.

The court employs circular reasoning in its assertion that applying state law would "undermine the very protection that Congress intended to confer by enacting § 3730(h)." Pet. App. 25a. As noted in the dissent, there simply is no

statutory language or legislative history suggesting that Congress intended to simplify the administration of such claims by having a federal limitations period. Pet. App. 37a-39a. The dissent further notes that application of the FCA's six-year period is not justified simply because it provides a longer duration than most state statutes provide. *Id.* "It is altogether plausible that Congress chose to respect . . . the diverse views of states on the length of limitations periods for wrongful discharge . . . ." *Id.*

Congress clearly intended to encourage whistleblowers to bring *qui tam* actions (as reflected in the FCA's bounty provision (§ 3730(d)), and to protect plaintiffs against retaliation by providing in § 3730(h) the remedy of double back pay, special damages and attorneys' fees. While Congress perceived the need for a uniform federal *remedy* against whistleblower retaliation, there is no such need for uniformity with regard to the merely *procedural* aspect of how soon a complaint must be filed.

Moreover, there is substantial justification for applying shorter limitations periods to retaliation claims. The policy behind any statute of limitations is to protect defendants from stale claims. *Wilson v. Garcia*, 471 U.S. 261, 271 (1985) ("Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost"); *Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 428 (1965) (Court noted in action against employer that statutes of limitations are designed to assure fairness to defendants by preventing surprises where evidence has been lost, memories have faded, and witnesses have disappeared).

Even in matters where the alleged retaliatory act occurred near the time of the alleged false claim, government contractors would be prejudiced if they were subject to employment-related claims brought six years later. Companies that employ tens of thousands of people can find it difficult to maintain a collective memory of the relevant events associated with one particular employee, particularly

if the retaliatory conduct was in the nature of harassment by a co-worker or some other unofficial, unauthorized conduct. Given the nature of government contracting, different projects come and go and employees frequently find themselves working within different groups of co-workers or moving to another division or company altogether. Section 3730(h) claims can be based upon alleged discrimination in employee compensation which itself is often based on subjective criteria that may be difficult for the employee's supervisors to recollect years later.

Under the Fourth Circuit's ruling, an employee can gain a significant tactical advantage over the employer by delaying filing her retaliation claim. The employee might have a greater recollection of the events because they affected her personally. In addition, the prolonged delay in filing could enhance the damages available to the employee under the double back pay provision.

Companies are entitled to know how long they remain subject to suit by a disgruntled employee. As the Supreme Court stated, "statutes of limitations . . . represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.'" *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (*quoting Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944)). State laws governing employment-related litigation form a basis for company record-keeping procedures and other compliance procedures. Government contractors should not have to endure the uncertainties that would arise from applying the FCA's statute of limitations to an employment claim. Nor should they be held accountable for up to six years for an action that could have been brought by the impacted employee almost immediately after that alleged wrongful conduct occurred.

CONCLUSION

For the foregoing reasons, *amici* NDIA, AIA, and PSC urge the Court to reverse the Fourth Circuit on the question presented and hold that the FCA does not specify a limitations period for retaliation claims.

Respectfully submitted,

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